IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 157 OF 2021 (DDJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIPS ACT (2021 REVISION)

AND IN THE MATTER OF AQUAPOINT L.P.

Appearances:	Mr James Corbett QC and Mr Michael Wingrave of Dentons for Genscript Corporation the general partner for and on behalf of AquaPoint L.P. Mr Tom Lowe QC and Mr Bhavesh Patel of Travers Thorp Alberga for Xiaohu Fan
Before:	The Hon. Justice David Doyle
Heard:	26 October 2021
Decision:	26 October 2021
Draft Reasons circulated:	22 November 2021
Reasons delivered:	23 November 2021

HEADNOTE

Application to strike out a just and equitable winding up petition on the ground that an alternative remedy was available which the petitioner was unreasonably refusing to follow – Relevant law outlined – Not a plain and obvious case – Strike out summons dismissed

REASONS

Introduction

1. On 26 October 2021 I had the pleasure and privilege of considering oral submissions delivered by James Corbett QC and Michael Wingrave of Dentons attorneys on behalf of Genscript Corporation (the "GP") the general partner for and on behalf of AquaPoint L.P. (the "Partnership") incorporated in the Cayman Islands as an exempted limited partnership and Tom Lowe QC and Bhavesh Patel of Travers Thorp Alberga attorneys for Xiaohu Fan (the "Petitioner").

2. I granted unopposed leave to amend the just and equitable winding up petition filed by the Petitioner in his capacity as a limited partner and ordered that the amended defence be filed and served before 4pm on 9 November 2021 and any amended reply before 4pm on 16 November 2021.

3. I dismissed the Partnership's summons to strike out the winding up petition and indicated that I would provide my reasons in due course. I now provide those reasons.

The strike out summons

4. By summons dated 17 September 2021 the GP on behalf of the Partnership applied for an order that the winding up petition be "struck out as frivolous, vexatious, scandalous and/or an abuse of process under the inherent jurisdiction of the Court and/or in the alternative pursuant to Order 18, rule 19(1) of the Grand Court Rules".

5. This scattergun/catch-all approach was refined at paragraph 24 of the Partnership's skeleton argument undated but filed late on Monday 25 October 2021 the day before the hearing. The relevant extract from paragraph 24 is as follows:

"It is said, in essence that the LPA [Amended and Restated Limited Partnership Agreement dated 25 May 2017] provides and prescribes for Limited Partners an exit route from the Partnership, that it is reasonable that the Petitioner should follow that route and (in substance) that it is neither just nor equitable for him to seek to wind up the Partnership without following the route provided for."

6. The strike out summons was also filed late in the day but I nevertheless heard it on its merits.

7. As long ago as 19 July 2021 I made an Order by consent that the Partnership file and serve its defence by 4pm 2 August 2021 and the Petitioner file and serve any reply by 4pm on 16 August 2021. I also ordered that list of documents be exchanged on or before 30 August 2021 with inspection to follow 2 weeks thereafter. I am informed that discovery and inspection duly took place and I note that a defence and reply were also filed. On 19 July 2021 I set the trial of the petition down for 3 days commencing on 26 October 2021 at 10am.

8. It was not until after the close of pleadings and discovery and inspection had taken place that the Partnership filed its belated strike out summons on 17 September 2021.

9. By Order made on 24 September 2021 by consent it was ordered that the trial of the winding up petition be adjourned to 26 to 28 January 2022 and that the strike out summons be heard at 10am on 26 October 2021.

A summary of the relevant law

10. I now turn to the relevant law. I am grateful to counsel for the provision of the relevant authorities both local and overseas. I have regard to all the authorities brought to my attention by counsel and I endeavor to summarise the relevant law as follows:

(1) A winding up petition will not normally succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. If it is clear at an early stage that the petition will fail on this ground it may be struck

out as an abuse of process (Martin J.A. at paragraph 23 in *Tianrui (International) Holding Company Limited v. China Shanshui Cement Group Limited* 2019 (1) CILR 481);

(2) In considering an application to strike out a winding up petition on the just and equitable ground there are two main questions to be addressed (i) whether there is an alternative remedy available to the petitioner; and (ii) whether the petitioner is acting unreasonably in not pursuing that alternative remedy. If a court is satisfied that both of those questions should be answered in the affirmative, then it can be expected to take the view that the presentation is an abuse of its process or, alternatively, that the petition is bound to fail because it would not, in those circumstances, be "just and equitable" that the relevant entity be wound up (Chadwick P. at paragraph 77 in *Camulos Partners Offshore Limited v. Kathrein and Company* 2010 (1) CILR 303; Martin J.A. in *Tianrui* at paragraph 23);

(3) It is sometimes impossible to say, prior to trial, that a shareholder is necessarily acting unreasonably if he takes the view that an equitable solution to the breakdown in the relationship of trust and confidence upon which a quasi-partnership was established would be for the company to be wound up;

(4) It is sometimes impossible, in advance of hearing the evidence at trial, for a judge to properly reach the view that a petitioner is acting unreasonably in refusing to pursue an alternative remedy (cf Chadwick P. at paragraph 46 *Asia Pacific Limited v. Arc Capital LLC and Haida Investments Limited* 2015 (1) CILR 299 in respect of a refusal of an offer to purchase shares not in respect of an alternative remedy). In all but a plain and obvious case, it is likely to be necessary for the facts underlying a just and equitable petition to be established at trial before the adequacy of a suggested alternative remedy, and the reasonableness or otherwise of the petitioner in failing to pursue it, can be established. Unless an available alternative remedy can be seen, without full examination of the facts, to be capable of satisfying the petitioner's concerns to an extent that would make it clearly impossible for him to persuade the court

that it would be just and equitable to make a winding up order, the petition should proceed (Martin J.A. in *Tianrui* at paragraph 29);

(5) The hearing of a strike-out application is not the place for resolution of disputed factual issues (Martin J.A. in *Tianrui* at paragraph 19). At the strike out hearing the court should not conduct a mini trial or attempt to resolve disputed factual issues. For the court to examine and finally determine whether there was in fact a justifiable loss of trust or lack of confidence in the conduct of management of a company's affairs will normally require a trial (Parker J at paragraph 52 in *Martin v Circumference Holdings Limited* FSD; unreported judgment 3 May 2021). The Court must normally assume that the facts asserted by the petitioner are true at the strike-out hearing stage. If the court, on a review of the material that has properly been put before it, finds that there are facts in dispute which are or may be material to a determination in the petitioner's favour on the petition, then it must let the petition go to trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established by evidence which is not disputed, lead the court to the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to a hearing and thereby to protract the uncertainty that hangs over the company (Peter Gibson J in *Re a Company No 003096 of 1987* [1998] 4 BCC 80 at page 81). A court should be prepared to scrutinize the properly available undisputed evidence supporting the allegations and to strike out the petition if it is obviously unsustainable (*RCB v Thai Asia Fund* 1996 CILR 9 Smellie J as he then was at page 18). Whether the evidence is adequate and whether it justifies winding up on the just and equitable ground will normally be a matter for the hearing of the petition (Moses J.A. at paragraph 63 in *Familymart China Holding Co. Ltd v. Ting Chuan (Cayman Islands) Holdings Corporation* 23 April 2020 subject to an appeal to the Judicial Committee of the Privy Council, leave having been given on 29 September 2021);

(6) There is a danger at the hearing of a summons to strike out a just and equitable winding up petition of pre-judging the outcome of the hearing of the winding up petition. It is only if it can clearly be seen at the outset that the just and equitable ground for winding up cannot be established that it will be appropriate

to strike out the petition (paragraph 28 Martin J.A. in *Tianrui)*. There is clearly a danger in pre-judging the outcome of the hearing of a petition and the court's strike-out jurisdiction needs to be exercised carefully. Equally the court needs to be careful to ensure the winding up procedure is not being improperly used (Parker J paragraph 59 *Martin v Circumference*);

(7) It is important to note that the right to petition for a just and equitable winding up is a remedy available as of right provided by statute (paragraph 47 Martin J.A. in *Tianrui)*;

(8) Where the remedy which the party presenting the petition seeks is indeed genuinely a winding up order, there is no alternative method of seeking that remedy (paragraph 43 Chadwick P. in *Asia Pacific*). It needs to be shown that the winding up procedure provides the only sufficient remedy to deal with the wrong about which the petitioner complains and that there is no adequate alternative available to the petitioner (paragraph 43 Parker J *Martin v Circumference* 3 May 2021);

(9) It has to be borne in mind that the jurisdiction to strike out should not be exercised unless it is perfectly clear that the petition which is to be struck out cannot succeed (page 297 Dillon LJ in *Re Copeland v Craddock Ltd* [1997] BCC 294 (judgment 20 August 1992));

(10) It has been often and rightly said that the court's jurisdiction to strike out a claim advanced by a plaintiff or petitioner is to be exercised very sparingly and only where the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the plaintiff is nonetheless entitled to the court's adjudication on it on the merits unless it is a claim which the court is satisfied cannot succeed (Bingham LJ in *Copeland* at paragraph 300);

(11) Facts rendering it just and equitable to obtain a winding up order cannot be reduced into categories. Illustrations may be used but general words should remain general and not be reduced to the sum of particular instances (Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 at pages 374-5). The caselaw, however, establishes various areas when the courts have intervened to grant relief including cases in which the company's substratum has gone, cases in which the management and conduct of the company are such that it is unjust and inequitable to require the petitioner to continue as a member, cases in which the courts have recognized legitimate expectations outside the company's constitution, cases in which legal rights are subjected to equitable considerations and cases involving cessation of trust and confidence (Derek French *Applications to Wind Up Companies* Fourth Edition at paragraph 8.162). Lack of probity in the conduct of the legal entity's affairs is a well-established basis for a just and equitable winding up (Parker J at paragraph 53 of *Martin v Circumference;* Moses J.A. in *Familymart China* at paragraph 30). Lack of probity complaints can be based on allegations of breaches of fiduciary duties (Moses J.A. in *Familymart China* at paragraph 31);

(12) It is well established that a company can be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the management or the majority owners (paragraph 22 Martin JA in *Tianrui*). For a loss of confidence ground to succeed it has to be a justifiable loss of confidence in the conduct and management of the company's affairs and not a subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company (*RCB v Thai Asia Fund* 1996 CILR 9 at pages 22 – 23 per Smellie J as he then was). This loss or lack of confidence must be grounded on the conduct of management, not in regard to their private lives or affairs, but in regard to the company's business; lack of probity in the conduct of the company's affairs may make it just and equitable that the company be wound up (Lord Shaw in the Judicial Committee of the Privy Council in *Loch v. Blackwood Ltd* [1924] AC 783 at 788);

11. Mr Corbett referred to an extract from *Minority Shareholders Law, Practice and Procedure*, Sixth Edtion, by Victor Joffe QC and others which summarises the position under English law and practice. At paragraph 8.112 the authors state that the strike out power of the English courts will (footnotes omitted):

> "…only be exercised in a plain and obvious case: the test is whether the claims made in the petition are 'bound to fail'. Before the court even considers the issues in any strike-out application in detail it should consider whether it is appropriate for it to consider such application at all: '… if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden or preparing for trial or the burden of the trial itself'. Whilst strike-out applications should normally be made well before the trial (to avoid wasting the resources of the parties and of the court), a strike-out application may be made at any time and is not bound to fail merely because it is made at a late stage, and a respondent should not be deprived of his costs of a successful strike-out application merely because the application was made late. A successful strike out application can be made even by a respondent whose points of defence have been struck out or has been debarred from defending."

12. Mr Corbett also referred to extracts from *Applications to Wind Up Companies*, Fourth Edition, by Derek French. French at paragraph 3.252 refers to the court's inherent jurisdiction to strike out applications which are frivolous, vexatious or otherwise an abuse of process.

13. At paragraph 8.224 under the heading "Striking out for failing to seek an alternative remedy" French makes the point that the court will strike out a winding up petition if it is plain and obvious that the petition will fail. French continues (footnotes omitted):

> "However, 'it is a very strong thing to say, on an application to strike out, that it is plain and obvious that the petitioner is behaving unreasonably in seeking a

winding up order.' The onus is on the person applying for the petition to be struck out to show that it is plain and obvious that the petition will fail."

French sets out quotations from *Tianrui*.

14. Mr Corbett referred in particular to paragraph 8.187 of French under the heading "Petitioner's desire to realize investment" which states:

> "The petitioner's desire to realize an investment in the company does not in itself justify winding up. The fact that the petitioner is insolvent makes no difference. The fact that the petitioner and other shareholders cannot agree the terms on which the petitioner is to leave the company does not justify a winding up order."

The amended winding up petition

15. In his amended winding up petition the Petitioner states that the Partnership is a holding entity whose only asset is shares in Legend Biotech Corporation ("Legend") a Cayman Islands registered exempted limited company which is listed on the NASDAQ.

16. The Petitioner refers to the 2016 Agreement which he says was negotiated between himself and Fangliang Zhang ("Frank Zhang") then the CEO and Chairman of the Board of Genscript Biotech Corporation a company listed on the Hong Kong Stock Exchange. The Petitioner adds at paragraph 14 that in early 2017 he was informed by Sally Wang, stated to be the Chief Operating Officer of Genscript Biotech Corporation that (1) the 2016 Agreement was not a formal agreement (2) it was necessary for the Petitioner to sign the subscription agreement dated 25 May 2017 (the "Subscription Agreement") and accede to the Amended and Restated Partnership Agreement dated 25 May 2017 (the "LPA") pursuant to which the Petitioner would be granted the right to subscribe for 65.96% of the interest in the Partnership in exchange for the payment of RMB 2,500,000 which would entitle the Petitioner to own 10% of Legend shares through the Partnership and (3) it was in the Petitioner's best interest to sign the Subscription Agreement and the LPA. It appears that the Petitioner signed up to these agreements.

17. The Petitioner says that it was clear that:

(a) the Subscription Agreement and the LPA were intended to reflect the substance of the 2016 Agreement "but with more technical and legal terms";

(b) the purpose and function of the Partnership was to serve as a stock incentive plan to motivate the Petitioner to work hard to increase the value of Legend and ensure the eventual initial public offering ("IPO") of Legend and that this was to be done through the creation of the Partnership to acquire and hold shares of Legend on behalf of the Petitioner and the other limited partner until the IPO of Legend;

(c) the restrictions on the transfer prior to the public listing of the Legend shares were intended to mirror the transfer restrictions under the 2016 Agreement to ensure that the Petitioner would work hard towards the goal of taking Legend public, and would not cash out before the IPO.

18. The Petitioner adds that in the absence of representations or misrepresentations and pressure applied on him, he would "not have signed documents which completely put him at the mercy of the GP and deprive him of all the rights to the Legend shares he paid for and is legitimately entitled to."

19. The Petitioner says he is a scientist, does not have commercial and business experience and was not represented by counsel when entering the LPA. The Petitioner adds that the GP was fully aware of the circumstances and took advantage of and induced the Petitioner to sign the Subscription Agreement and the LPA knowing that the Petitioner's expectation was that the Legend shares would be transferred back to him following the IPO of Legend. The Petitioner says that the terms of the agreement fall far short of the Petitioner's expectation.

20. Under the heading **"Unreasonable and oppressive behaviour of GP"** the Petitioner at paragraph 20 states:

"There is no longer any reason for the Partnership to continue to hold shares in Legend on behalf of the Partners, and no longer any purpose to the Partnership."

21. The Petitioner at paragraph 22 refers to the GP agreeing to sell 200,000 (of the 10,000,000) Legend shares and distribute the proceeds to the Petitioner, but after the Petitioner pursued his demands by way of attorney's letters the GP put a stop to the process of selling the Legend shares.

22. The Petitioner at paragraph 23 says that the refusal of the GP on behalf of the Partnership to dissolve and/or wind up the Partnership and/or dividend in specie the Legend shares held on behalf of the Petitioner is in breach of "the aforesaid Agreement or understanding or a failure to meet the Petitioner's aforesaid legitimate expectations."

23. The Petitioner also alleges a conflict of interest of the GP.

24. At paragraph 27 the following is stated:

> "The GP has and continues to act in breach of the said duty [to act in good faith or in the interests of the Partnership] and, in particular, has done so to advance its own ends and those of its director and ultimate beneficial owner, Frank Zhang, rather than those of the Partnership or limited partners in that:
>
> a. Frank Zhang holds other shares in Legend through the GP and is the controlling shareholder of the GP.
> b. By forcing the Partnership to continue to hold the shares in Legend Mr. Zhang was able to control its approximately 15% (which was recently diluted to 10% due to a private equity investment in Legend) voting control in Legend in addition to the shares he owns.
> c. Since May 2017 and following the Legend IPO Mr. Zhang has and continues to exercise rights in respect of the shares."

25. The Petitioner under the heading "**Criminal investigation of Frank Zhang"** at paragraph 29 makes reference to a Notice of Arrest issued by the People's Republic of China Anti-Smuggling Department of Zhenjiang and the public announcement of

Genscript on 25 May 2021. The Petitioner refers to the unavailability of Frank Zhang to make decisions for the GP until he was released on bail. The Petitioner states that he has serious concerns about continuing to be a limited partner in a partnership with a GP under Frank Zhang's control.

26. The Petitioner says he also requested the GP to provide him with full complete and accurate books of account and records of the Partnership on 2 April 2021 but no response has been received to that letter and the request has been ignored, the Petitioner says in breach of section 22 of the Exempted Limited Partnership Act (2021 Revision) (the "ELP Act") and section 10.1 of the LPA.

27. The Petitioner endeavours to provide a summary of the relief requested seeking "the winding up or dissolution" of the Partnership on the basis that it is just and equitable that the Partnership be wound up for the following reasons:

(a) the affairs of the Partnership have been conducted oppressively and/or in breach of an agreement or understanding by the GP;

(b) the GP has demonstrated a lack of probity in its actions and has committed clear breaches of its fiduciary duties, in particular its duty to act in good faith in the best interests of the Partnership. The GP has abused and misused its power and authority by acting in a way which prefers its and its ultimate beneficial owner's own interests ahead of the Partnership and its limited partners;

(c) the Petitioner justifiably lacks faith and confidence in the GP and its ability to manage the Partnership's affairs in the best interests of the Partnership as a whole.

28. At paragraph 36 the Petitioner humbly prays that the Partnership be wound up by the court in accordance with the ELP Act and Partnership Act (2013 Revision) (the "Partnership Act") and at paragraph 37 requests that Martin Trott of R&H Restructuring (Cayman) Limited and Terry Kan of Shinewing be appointed as joint official liquidators of the Partnership under Part V of the Companies Act (2021 Revision) (the "Companies Act").

29. Paragraph 41 contains a request for blanket authorization to exercise all powers set out in Parts I and II of the Third Schedule to the Companies Act which would not normally

be granted without clear evidence justifying the same (see *UCF Fund Limited* 2011 (1) CILR 305).

The defence as at the hearing on 26 October 2021

30. Some of the main points raised in the defence were as follows:

(1) it is admitted that an agreement concerning a means by which the Petitioner and other members of the team would earn equity in Legend Nanjing was signed in 2016;

(2) it is denied that the Petitioner was offered an opportunity to purchase shares under the 2016 Agreement;

(3) the description of the circumstances under which the LPA and Subscription Agreement came about set out under paragraph 14 are denied. The Petitioner was given an opportunity to buy equity by investment into the Partnership;

(4) it is denied that the Petitioner was told that it would be necessary for him to accede to the LPA or Subscription Agreement;

(5) the Petitioner had substantial input in the drafting process of the LPA and submitted comments including reference to the exit provisions of the LPA;

(6) the 2016 Agreement could not exist in parallel with the arrangements of the Partnership and was accordingly terminated;

(7) the LPA and Subscription Agreement amounted to an entirely new and separate arrangement;

(8) the Petitioner would under the LPA and Subscription Agreement hold an interest in the Partnership rather than holding shares in Legend directly;

(9) the terms governing the disposal of interest by a limited partner are fully and clearly set out between clauses 6.6(a) to (e) of the LPA which provided a formal and reasonable mechanism for exiting the Partnership;

(10) the expectations and representations are denied and the Petitioner was not improperly induced to sign the LPA and/or the Subscription Agreement;

(11) it is denied that the Petitioner's interest in the Partnership would cease to be the subject of "lock up" for a period of 6 months after the IPO;

(12) it is admitted that the Petitioner paid RMB 2,500,000 in return for his interest in the Partnership, which interest approximated to 10% of the shares of Legend;

(13) it is denied that the Partnership no longer serves any purpose;

(14) the conflict of interest and breach of duty allegations are denied;

(15) it is admitted that there is an investigation into Genscript and that Frank Zhang is "connected" to that investigation "in his capacity as the representative of the company under the laws of the PRC. It is denied that Frank Zhang is the target of a criminal prosecution in his personal capacity";

(16) it is admitted that a request was made for complete and accurate books of accounts and records of the Partnership by letter dated 22 April 2021. By letter dated 21 May 2021 the Petitioner was asked to identify the documents that he sought, but did not respond with any form of particularity.

The reply to the defence as at the hearing on 26 October 2021

31. In the reply to the defence the following points were made:

(1) the Petitioner's 69.54% interest is now worth approximately US$422,980,373;

(2) the Petitioner will rely upon emails which demonstrate that the Petitioner was assured of a 10% share of Legend;

(3) the Petitioner was not given any alternative but to enter the LPA without consideration of the impact on his rights;

(4) the financial arrangement remained the same;

(5) it is admitted that the Petitioner was aware that the terms of the LPA and Subscription Agreement were worse than the 2016 Agreement and he preferred to stay with the 2016 Agreement but due to pressure from Frank Zhang and Sally Wang "he was forced to enter into the LPA on terms that should never have been worse than the 2016 Agreement";

(6) it is denied that the LPA offers the Petitioner a mechanism to transfer his interest in the Partnership under the current circumstances;

(7) the Petitioner simply wishes to have his Legend shares transferred from the Partnership to his sole name as intended under the 2016 Agreement;

(8) the Petitioner has not tried to follow the procedure set forth in section 6.6(a) to (c) of the LPA as they do not apply to any transfer after the Legend IPO. In any event transferring his interest in the Partnership is not what the Petitioner is seeking under the petition.

A review of some of the documentation before the court

32. Amongst the documentation before the court was the 2016 Agreement. It is stated that:

> "It is intended to grant 10,000,000 shares of [Nanjing Legend Biotechnology Co., Ltd] to the Participants as from June 1, 2016 under this Plan (total share

capital of the Company: 100,000,000 shares), representing 10% of the existing shares of the Company."

33. There is an also an unsigned acknowledgement dated "2017" by "FAN Xiaohu" in respect of "Nanjing Legend Biotech Co., Ltd" which refers to that company setting up a share incentive platform, "AquaPoint L.P." in the Cayman Islands on February 16, 2017. There is further reference to a Partnership Agreement "as of May 25, 2017, pursuant to which the incentive shares that have been granted to me shall be granted in instalments." It is acknowledged that the "Original Share Incentive Plan" terminated on the execution of the Partnership Agreement and "shall no longer have any impact or binding force on me and the Company." Paragraph 3 includes the wording:

> "… I shall not claim any rights other than those under the Partnership Agreement and the Subscription Agreement from the Company in accordance with any provisions of the Original Share Incentive Plan."

34. The Subscription Agreement refers to the subscription amount RMB 2,500,000 and in capitals the following appears:

> "BASED UPON THE FOREGOING, EACH ACQUIROR OF A PARTNERSHIP INTEREST MUST BE PREPARED TO BEAR THE ECONOMIC RISK OF INVESTMENT THEREIN FOR AN INDEFINITE PERIOD OF TIME. THE SUBSCRIBERS ARE ENCOURAGED TO SEEK INDEPENDENT LEGAL, ACCOUNTING, INVESTMENT AND TAX ADVICE REGARDING THEIR INDIVIDUAL CIRCUMSTANCES AND FINANCIAL OBJECTIVES IN DETERMINING WHETHER TO SUBSCRIBE FOR AN INTEREST IN THE PARTNERSHIP."

35. The LPA refers to the Initial Partnership Agreement dated 16 February 2017. Clause 2.4 of the LPA refers to the term of the Partnership and states that the Partnership "will continue until the Partnership is dissolved in accordance with this Agreement and the Law." The Law is defined as the Exempted Limited Partnership Law (as amended) of the Cayman Islands.

36. Clause 3.2 of the LPA refers to limitations on the authority of limited partners, clause 4.1 the authority of the general partner to manage the partnership and clause 4.2 refers to the powers of the general partner. Clause 6.6 is crucial to a consideration of the strike out summons and I make no apologies for setting it out in full:

> "6.6 **Transfer of Limited Partner Interest**
>
> (a) On or before the fourth (4th) anniversary of the Partnership's formation or the date of the initial public offering of Legend Biotech Corporation, whichever is earlier, a Limited Partner may only Transfer its Interests to the General Partner or any Persons at such price as approved by the General Partner with the prior written consent of the General Partner, which consent may be given or withheld for any reason (or no reason at all) in the sole and absolute discretion of the General Partner.
>
> (b) After the fourth (4th) anniversary of the Partnership's formation but before the date of the initial public offering of Legend Biotech Corporation, provided that there will not be any adverse impact on the Partnership in relation to such Transfer, a Limited Partner may Transfer their interests to the General Partner or any Persons as approved by the General Partner with the prior written consent of the General Partner, which consent may be given or withheld for any reason (or no reason at all) in the sole and absolute discretion of the General Partner.
>
> (c) In the event that a Limited Partner (the "**Selling Limited Partner**") wishes to transfer all or part of its interest (the "**Offered Interests**") to any Persons (the "**Offeree**") pursuant to Clause 6.6, it shall give written notice (the "**Offer Notice**") to the General Partner of its desire to sell the Offered Interests to the Offeree. The Offer Notice shall identify the number of Offered Interests and the price (the "**Offer Price**") of the Offered Interests as well as the identity of the Offeree and all other material terms and conditions of the proposed

transfer. For a period of 30 Business Days (the "**Offer Period**") following receipt of the Offer Notice, the General Partner shall have the right and option (but not the obligation) to purchase all or part of the Offered Interests at the Offer Price or at such price as may be agreed between the General Partner and the Selling Limited Partner and on the same terms and conditions set forth in the Offer Notice. If the General Partner determines not to exercise its option to purchase all or a portion of the Offered Interests then, subject to first obtaining the written consent of the General Partner in accordance with this Agreement, the Selling Limited Partners shall have the right to enter into and consummate the transfer of all or a portion of the remaining Offered Interests to the Offeree.

(d) No transfer of Interests under this Agreement shall be effective until:

(i) The holder of the record thereof or its agent duly authorized in writing shall deliver to the General Partner at the offices of the Partnership a duly executed instrument of Transfer or deed of assignment;

(ii) the transferee has executed an effective deed of adherence to this Agreement, including an acknowledgement of the transferee as to any balance of the Capital Contribution remaining to be advanced;

(iii) the General Partner has provided its prior written consent to such Transfer, which consent may be withheld in the sole discretion of the General Partner; and

(iv) any relevant requirements of the Law and other applicable legislation have been complied with.

(e) Upon the foregoing conditions having been met, this Agreement shall constitute the irrevocable consent in writing of the Limited Partners to any such Transfer and any such Transfer, when complete, shall constitute the transferee a substituted Limited Partner. In no event shall any further consent of any Limited Partner (other than the transferor) be required to effect such Transfer or the filing of any registration under any applicable legislation and any such Transfer shall not cause a dissolution of the Partnership. No Transfer shall relieve the transferor from any obligations to the Partnership incurred prior to the transfer becoming effective."

37. Clause 7.7 of the LPA is entitled "No Right of Withdrawal" and provides:

> "No Limited Partner will be permitted to withdraw from the Partnership, or to withdraw any part of its Capital Account, save with the prior consent of the General Partner, which consent may be given or withheld for any reason (or no reason at all) in the sole and absolute discretion of the General Partner."

38. Clause 9 deals with distributions and provides as follows:

> "At the time or times determined by the General Partner, the General Partner shall cause the Partnership to distribute any assets of the Partnership that it does not, in its discretion, consider to be necessary to the operation of the Partnership. Any distribution pursuant to this Clause 9 shall be made to the Partners pro rata in accordance with the Partners' respective Interests determined by reference to the Capital Contribution from time to time."

39. Clause 11 is also an important clause as it deals with the dissolution of the Partnership. It makes detailed provision for the dissolution of the Partnership. Clause 11.1 refers to the events requiring winding up and dissolution. Clause 11.2 provides that on the dissolution of the Partnership the GP shall act as liquidator. Clause 11.3 deals with the winding up of the business and the liquidation of the Partnership's assets. It also contains provisions in respect of the distribution of the net proceeds from the realisation

of the Partnership's assets. Clause 11.4 provides that the Partnership shall terminate when all of its assets have been disposed of and the net proceeds have been distributed as provided for in the LPA and a notice of dissolution has been filed with the Registrar of Exempted Limited Partnerships in the Cayman Islands.

40. Schedule 1 of the LPA sets out the capital commitments as follows:

Limited Partner

Limited Partner name	Company number or identity number	Commitment Amount (US$ or equivalent)	Percentage of Commitment Amount	Type of Commitment (Cash/Property)	Timing for Commitment
FAN Xiaohu	…(Canadian passport)	RMB 2,500,000	65.96%	Cash	On or before 29 December 2017
WANG Ye	…(PRC passport)	RMB 1,250,000	32.98%	Cash	On or before 29 December 2017

General Partner

Commitment Amount (US$ or equivalent)	Percentage of Commitment Amount	Type of Commitment (Cash/Property)	Timing for Commitment
RMB 40,000	1.06%	Cash	On or before 29 December 2017

The affidavit evidence before the court

41. It has been stated that the summary jurisdiction of the court under Order 18 rule 19 was not intended to be exercised by a minute and protracted examination of the documents and the facts of the case and to do that was to usurp the position of the trial judge and was itself an abuse of the inherent power of the court and not a proper exercise of the power. This point was made by Danckwerts LJ many years ago in *Wenlock v. Maloney* [1965] 1 WLR 1238 at 1244. The hearing of strike out applications should not normally involve any extensive enquiry of the facts. With those cautionary words in mind I turn now to briefly consider the main areas covered by the affidavit evidence placed before this court.

42. In his first affidavit the Petitioner says that he was the co-founder of Legend and adds:

(1) he entered into the 2016 Agreement;

(2) in early 2017 he was informed by Sally Wang who was the Chief Operating Officer at Genscript at the time that the 2016 Agreement was not a formal contract and he should sign a Subscription Agreement to become a limited partner in the Partnership;

(3) he relied on representations made by Sally Wang and trusted Frank Zhang to be acting in good faith and did not take legal advice with respect to signing "the Confirmation Letter and the subscription agreement". He understood that he would be able to "freely access and dispose of the Legend shares once the IPO had happened";

(4) he says he has unsuccessfully tried to have "my shares in Legend…transferred to my personal name."

43. Frank Zhang in his first affidavit sworn on 16 September 2021 says he is duly authorised by the GP of the Partnership to make the affidavit and exhibits various documentation. Frank Zhang says that it is the Partnership's case that "the route prescribed under the LPA or the LPA more generally does provide for post IPO exit and that is not unreasonable for the Petitioner to adopt that route". Frank Zhang adds: "Though the Petitioner suggests that he wishes to receive shares referable to his interest in the Partnership into his own possession, directly, that method of disposal has never been available under the terms of the LPA." Frank Zhang refers to the defence and notes that in the Reply the Petitioner admits that he has not made any attempt to follow the exit procedures set out in the LPA. Frank Zhang observes that "the Petitioner signed the LPA after giving a warranty and representation, during the course of signing his subscription documents, that he understood and had had the opportunity to seek legal advice upon the same."

44. Frank Zhang comments that where the Petitioner has not invoked the specific provisions for the exit of a limited partner from the Partnership "it cannot be just and equitable to wind up the Partnership." Frank Zhang adds "… to assert the contrary in support of his claim, as the Petitioner appears to do, is frivolous, vexatious or scandalous and an abuse of the process of this honourable Court."

45. In his second affidavit sworn on 6 October 2021 the Petitioner stresses that the terms of the LPA do not provide him with any alternative remedy. The Petitioner makes the following points, amongst many others:

(1) "what I am seeking is to have my entitlement in the Partnership to provide me with my proportionate shares in Legend…A winding up is the only process I know where a Court can give me a remedy which might achieve this goal, even if the distribution were made by a liquidator";

(2) the strike out application was filed "belatedly and in what I believe is a clear and deliberate effort to delay the hearing of the petition";

(3) the 2016 Agreement was in fact signed by the Petitioner and Frank Zhang on 18 August 2015;

(4) "in early 2017... Ms Wang informed me that the 2016 Agreement was not a formal contract and was inadequate to accomplish its purpose, and that it was in my best interest to sign a subscription agreement and become a limited partner in the Partnership. I was informed that I would be granted the right to subscribe for 65.96% of the interest in the Partnership for the payment of RMB 2,500,000 which would entitle me to own 10% of Legend shares through the Partnership, which reflected my entitlement under the 2016 Agreement.";

(5) "I was given to understand by Frank Zhang and Sally Wang that the terms under the subscription agreement and the LPA were substantially the same to those under the 2016 Agreement."

46. A review of some of the communications exhibited to the affidavits includes the following:

(1) There is an email from the Petitioner dated 23 June 2016 14:43 to Sally Wang at GenScript indicating that "We will pay RMB 2.5 million to subscribe for 10% of the shares" in Legend;

(2) "My anxiety is that I don't wish to hold on my hands any agreements that I totally do not understand" (Petitioner email 26 August 2016, 10:56pm);

(3) There are WeChat conversations between Frank Zhang and the Petitioner referred to as Frank Fan as follows:

> "19 February 2017 6:47 Frank Fan: Frank, regarding my investment plan, two to three months have passed. Sally never active try to communicate with me regarding the progress or on any issues, and not responded to my latest WeChat message, maybe she is travelling the work. I recall that you care very much about the ability to execute plans. But the ability of this lawyer to execute the plan is so terrible that it is beyond imagination. I sill (sic) believe in your sincereness, but there is at least problems with attitude and execution. Are you and Sally treating me as a partner on Legend, or …
> 19 February 2017 10:02 Frank Zhang
> Xiaohu: it is ok that you are following up on this matter, that is understandable, but that you are having doubts, that is not right. What do you think? You can see from Genscript Biotech recent announcement, that the company has already taken out close to 25% of shares to give to the employees, now after being listed more shares were taken out to keep people at the share. Shares for you in Legend was not suggested by you, but it was suggested by the company, yes? The company has signed agreement with you, and the new investment agreement is just to formalise the matter. Even with enhanced formalisation, that is just a piece of paper. If you don't trust the previous agreement, then why would you trust a new agreement? You are one of the main leaders of Legend, if you are

always suspicious towards your fellow partners, then how would Legend expand into a bigger company? Frank

19 February 2017 10:09 Frank Fan

Frank: As you know, I am not the patient type, sorry, I am a bit thin skinned and shy to disturb you with questions. And when I finally ask you a question, I give the impression of being impatient. As I said, it is not that I do not trust you and Sally. It is that this matter is more complicated than expected, and the lawyer's ability to execute the matter is just terrible, plus the lack of communication."; and

(4) The Petitioner emailed Sally Wang on 6 January 2021 seeking the distribution of the shares in Legend to the partners in accordance with their partnership interests. The Petitioner made reference to the "arrest of Frank Zhang." A reminder was sent on 18 January 2021. Sally Wang responded on 20 January 2021 referring to the LPA and stating that it was not "a viable option to wind up the Partnership as this would involve the interests of the other limited partners." The Petitioner was invited to request the sale of shares and it was indicated that the GP would exercise his discretion to approve and determine the amount of shares to sell.

47. Mr Lowe referred to some of the communications between the Petitioner, Sally Wang and Frank Zhang. For example in his email dated 2021-02-03 18:41:12 to Sally Wang copied to Frank Zhang the Petitioner refers to the proposal that he have the Partnership sell some of the Legend shares and have the proceeds distributed to him. The Petitioner says that he is still of the view that the Partnership should be dissolved and its assets distributed to the limited partners but in any event he requests that up to 2,000,000 Legend shares be sold and the proceeds distributed to him while "we sort out our differences regarding the Partnership." The Petitioner produces a memo summary of a meeting 26 February 2pm Beijing time at Frank Zhang's office at Genscript: "Zhang refused my sales plan and only mentioned maybe let me sale 1 million $ amount (about 30k ADR) in one year. His reason is that Legend need to raise fund this year and my sales plan will crash the stock price blabla … and refuse to further discuss the issue …"

48. By letter dated 22 April 2021 Travers Thorp Alberga (the Petitioner's Cayman attorneys) wrote to the Partnership and copied Genscript Corporation attention Frank Zhang setting out their client's case and demanding that the GP transfer all of the Legend shares that the Partnership holds to each partner in accordance with their respective partnership interest and for the Partnership to then be dissolved; or if the other limited partner and the GP wish to continue with the Partnership, the Petitioner's proportionate shares from the Partnership (totaling 20,000,000 shares) be transferred to him noting that "this is permissible under clause 6.6 of the LPA." There was also a request for the provision of full, complete and accurate books of account and records of the Partnership.

49. Travers Thorp Alberga followed this letter up with a letter dated 26 April 2021 noting that after receipt of the 22 April 2021 letter Frank Zhang contacted the Petitioner by phone on 23 April 2021 and made various threats including a threat that "the GP may stop the sale of shares by the Partnership requested by our client which Frank Zhang/GP previously approved and which sale was set into motion in March." It was added that Frank Zhang subsequently arranged for the sale of the shares to be suspended.

50. There is a letter dated 12 August 2021 from Dentons to Bhavesh Patel of Travers Thorpe Alberga which states: "It seems plain that the prescribed exit route [between clauses 6.6(a) and (e)] of the LPA] represents a reasonable alternative to winding up and your client is invited to make use of it. Our client will engage in any such attempt in good faith and respond to it in the manner required by the LPA".

Jurisdiction to wind up

51. It appeared to be common ground between the parties that subsequent to the judgment of Parker J in *Padma Fund L.P.* (FSD; unreported judgment 8 October 2021) the proper jurisdictional basis for a limited partner to present a winding up petition against an exempted limited partnership was section 3 of the ELP Act and section 35(e) of the Partnership Act.

52. Section 3 of the ELP Act provides:

"The rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act."

53. Section 35(e) of the Partnership Act provides that on the application by a partner the court may decree a dissolution of the partnership "whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved."

54. Mr Corbett at the hearing accepted "for the purposes of at least today" that section 36(g) of the EPA was also applicable. That provision in effect provides that except to the extent that provisions are not inconsistent with the EPA, and in the event of any inconsistencies, the EPA shall prevail, subject to any express provisions of the EPA to the contrary, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules 2018 shall apply to the winding up of an exempted limited partnership and for this purpose:

"on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable."

55. Subsequent to the hearing I came across the judgments of the Court of Appeal in *Rhone Holdings L.P.* 2016 (1) CILR 273 refusing to grant extension of time within which to appeal. In that case counsel on behalf of the applicants submitted that section 36(3)(g) of the ELP Act was inconsistent with and overrode section 95(2) of the Companies Act. At paragraph 23 Rix J.A. (with whom Field J.A. and Chadwick P. agreed) recorded a concession by counsel as follows:

"Nevertheless, when pressed, Mr Asif was bound to concede, as he did, that the power to wind up on the just and equitable ground, or indeed on any ground, is to be found not in the Exempted Limited Partnership Law, but in the underlying

provisions of Part V of the Companies Law, to which of course s.36(3) of the Exempted Limited Partnership Law makes express reference, and that there is no language, express or necessarily to be implied, in the Exempted Limited Partnership Law which is inconsistent with provisions for winding up to be found in Part V of the Companies Law, or in particular, S.95(2) of that Law…"

56. *Rhone Holdings L.P.* 2016 (1) CILR 273 does not appear to have been brought to the attention of Parker J by counsel as Parker J only refers to the first instance decision of Mangatal J in *Rhone Holdings L.P.* (unreported 16 September 2015) at paragraph 81 of his judgment. Moreover, section 3 of the ELP Act and section 35(e) of the Partnership Act do not appear to have been brought to the attention of the Court of Appeal as they are not referred to in the judgments. I leave open for the hearing of the winding up petition in January 2022 any submissions in respect of the proper jurisdictional basis of the petition in this case.

The submissions on behalf of the parties

57. Before reaching my decision to dismiss the strike out summons I carefully considered the written and oral submissions made on behalf of the parties. I took all those submissions into account but for the sake of brevity they are not all referred to in this judgment.

58. Mr Corbett for the GP for and on behalf of the Partnership in his skeleton argument referred to the background of the proceedings, the Petitioner's complaints and the relief claimed. Mr Corbett emphasized that winding up was a drastic remedy and the court should be slow to resort to it.

59. Mr Corbett referred to the various agreements between the parties stressing that it had been made clear to the Petitioner that his investment in the Partnership was indefinite and that he should take advice from professional advisers. It was stated that the Petitioner was not being taken advantage of and that he had no case on "expectations" or representations. It was added that the Petitioner could not have his US$400 million

when it suited him and the Petitioner's wishes in this respect were no basis on which to seek an order that the Partnership be wound up.

60. Mr Corbett stressed the need to view the winding up petition in the context of the provisions of the ELP Act, the primacy of the role of the GP, the limited role of the limited partners and the express provisions of the LPA.

61. Mr Corbett submitted that there was nothing in the allegation of conflict of interest.

62. It was submitted that the allegation of a criminal investigation of Dr Zhang was "simply mud-slinging and, apart from its scandalous nature, takes the petition nowhere." It was submitted that the Petitioner is not entitled to the transfer of shares "unless and until there is either agreement to that effect or some legal process says otherwise. Unless and until that happens, his Limited Partner Interest is an interest in the Partnership."

63. Mr Corbett, in his oral submissions submitted in effect that just because a limited partner wanted his money back does not mean that he can simply circumvent the provisions of the ELP Act or the LPA and present a just and equitable winding up petition and obtain a winding up order dissolving the partnership. Mr Corbett referred to *Anglo-Contintental Produce Co Ltd* [1939] 1 ALL ER 99 and the judgment of Bennett J at first instance in the English Chancery Division on 21 December 1938. At page 102 Bennett J stated:

> "It is clear, therefore, to my mind, that the mere fact that a majority want to get their money back does not make it just and equitable that the company should be wound up in order that they may get it back. There must be something more than that."

64. Bennett J then refers to some other authorities to the effect that a shareholder puts his money into a company on certain conditions including an assumption that the business will be conducted with commercial probity and efficiency. If there are violations of the conditions and for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them

with, then there does arise a situation where it may be just and equitable for the court to wind up the company.

65. Mr Corbett also referred to a judgment of Belinda Ang Saw Ean J sitting at first instance in the High Court of Singapore in *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR (R) 46. In that case a just and equitable petition was dismissed. It was not a strike out case.

66. The headnote states that it was held that fairness was the relevant touchstone and a member was not entitled to "exit at will". The test for unfairness was an objective one. It was held that if there was a breakdown at all in the relationship between the shareholders in that case, the breakdown was due to a lack of consensus as to the terms on which they were to amicably sever their friendship. Such disagreement was not a matter concerning the conduct of the company but rather a dispute as to the disposal and value of the shares. It was held that there was no jurisdiction to wind up the company on the just and equitable ground merely because shareholders could not reach an agreement as to the terms on which they were to sever their relationship. The shareholder petitioner's objective was consistent with a desire to exit the company at will. There were no proven improprieties in respect of the conduct of the affairs of the company in that case.

67. The judge at first instance referred to the decision of the Court of Appeal in Singapore in *Sim Yong Kim v. Evenstar Investments Pte Ltd* [2006] 3 SLR (R) 827 which approved Lord Wilberforce's well known exposition of the meaning of "just and equitable" in *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360 and concluded that the notion of fairness was the touchstone by which to decide whether the court should grant relief on a winding up petition on the just and equitable ground. Chan Sek Keong CJ (delivering the judgment of the Court of Appeal of Singapore) stated at [31]:

> "We accept that the notion of unfairness lies at the heart of the "just and equitable" jurisdiction in s254 (1)(i) of the [Act] and that that section does not allow a member to 'exit at will', as is plain in its express terms. Nor does it apply to a case where the loss of trust and confidence in the other members is

self-induced. It cannot be just and equitable to wind up a company just because a minority shareholder feels aggrieved or wishes to exit at will. However, unfairness can arise in different situations and from different kinds of conduct in different circumstances. Cases involving management deadlock or loss of mutual trust and confidence where the 'just and equitable' jurisdiction under s254 (1)(i) has been successfully invoked can be re-categorised as cases of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholder. Unfairness can also arise in loss of substratum cases …"

68. On 25 October 2021, the eve of the hearing, Mr Wingrave filed another authority namely *Rhone Holdings L.P.* (FSD; Mangatal J; Reasons for Judgment with Errata 29 September 2015). Mr Corbett, having outlined the position of a partnership, general partners and limited partners under the ELP Act, briefly referred to such authority at the hearing and placed emphasis on the comment by Mangatal J at paragraph 53 of her judgment, namely "the ability of Partners to agree that the Partnership should be determinable only by mutual agreement does have a long history at common law." In *Rhone Holdings* the agreement contained an express clause 5.12 whereby the parties agreed not to cause an involuntary proceeding or petition seeking winding up of the Partnership.

69. At one stage during the hearing Mr Corbett, making his submissions remotely from Jersey in the Channel Islands via video link, referred to the well-known maxim of Jersey law *La convention fait loi des parties*. In *Doorstep Ltd v Gillman* 2012 (2) JLR 297 at paragraph 18 it was described as having "been enshrined in Jersey law for centuries." Le Gros described it as "*un principe en quelque sorte sacre*" – a sacred principle (*Traité du Droit Coutumier de L'Ile de Jersey* (1943) at 350. At its core such maxim, in so far as I understand it, means that the parties are bound by their agreement. Translated it means literally "the agreement makes the law of the parties." In the context of this case even if such maxim was good law in the Cayman Islands it would of course be subject to Lord Wilberforce's comments in *Ebrahimi* in respect of equitable considerations and the subsequent case law in respect of just and equitable winding up petitions.

70. In the Petitioner's concise and well focused skeleton argument Mr Lowe set out the factual and procedural background and the relevant applicable principles. The main written submissions were:

(1) the first question is whether there is an alternative remedy available before the court even considers whether the Petitioner is unreasonably failing to avail himself of it;

(2) the remedy sought is a winding up order based on the GP's serious breaches of duty taking into account the factual evidence presented by the Petitioner (including an allegation that Frank Zhang reneged on an agreement to a partial sale of some of the Petitioner's shares) which have given rise to a justifiable loss of trust and confidence in the GP;

(3) the LPA does not provide any mechanism under which the Partnership can be wound up or independent liquidators can be appointed over it, and in any event most action under the LPA cannot be done without the GP's consent ;

(4) offer of a price to buy out his partnership interest is not what the Petitioner wants. He wants the Legend shares themselves that a liquidator could distribute to him. The GP is unreasonably refusing to transfer the Legend shares to the Petitioner. The LPA does not provide an alternative remedy;

(5) the GP's failings and misconduct, and in particular the criminal investigation into Frank Zhang has led to an irreconcilable breakdown of trust and confidence which cannot be repaired. The GP's misconduct and lack of probity, including breaches of the ELP Act, have given rise to a justifiable and irreparable loss of trust and confidence in the GP. The Petitioner now wishes to divorce himself from the Partnership by having his proportionate Partnership assets transferred to his own personal name (in an entity which he helped to build and create) which he has understood to be his legal right throughout and to which he has a legitimate expectation as a founding partner;

(6) the pleaded allegations and the evidence in support are sufficient and, if accepted, would justify the winding-up of the Partnership;

(7) there are substantial factual matters in dispute which will require witness evidence and cross-examination in order for the court to determine them. The disputed factual matters cannot be determined at the strike out stage.

71. Part way through the hearing Mr Lowe produced another authority namely *Lau v Chu* [2020] 1WLR 4656 (PC) which focused on statutory provisions in the British Virgin Islands. Mr Lowe made reference to the judgment of Lord Briggs at paragraph 15. Lord Briggs referred to the long history in respect of the dissolution of a partnership on the basis of an irretrievable breakdown in trust and confidence between the participating members and the jurisprudence on the just and equitable ground which developed from the law of partnership. Lord Briggs at paragraph 18 also referred to Lord Wilberforce's well-known judgment in *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360 commenting to the effect that it contained a summary of the circumstances in which the relationship between the members of the relevant legal entity may cause their strict legal rights to be subjected to equitable considerations which has stood the test of time. Lord Wilberforce referred to the "just and equitable" provision which he said does not entitle one party to disregard the obligation he assumes by entering a company nor the court to dispense him from it but:

> "It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way."

72. Mr Lowe also referred to the comments made by Lady Arden in *Lau v Chu* at paragraph 83 namely:

> "Lord Wilberforce laid down a description of a quasi-partnership company, but it was never intended to read as a statute. Where there was a quasi-partnership, then it was possible to read obligations into the Articles of Association."

Lady Arden delivered these comments just eight months after she had delivered her important lecture at The Peace Palace in The Hague (3 February 2020) on *The Judicial Committee of the Privy Council as an important source of financial services jurisprudence* which generously acknowledged the significant contribution of the Cayman Islands to such jurisprudence and its "importance in today's world in commercial terms", emphasising how the jurisdiction legitimately attracts "massive funds for investment" and how the determination of those weighty financial cases "inspires respect for the rule of law."

73. Mr Lowe placed emphasis on paragraph 37 of Martin J.A.'s judgment in *Tianrui*. In that paragraph Martin J.A. refers to the company's position that the appellant could bring its association with the company to an end by selling its shares on the Hong Kong Stock Exchange albeit at a discount. Martin J.A., delivering the judgment of the Court of Appeal, stated:

> "In our view, these assertions epitomize what is wrong with the company's position. If the actions of the company, prompted by directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the company, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the company can point to other remedies which, alone or in combination, might arguably go all or some way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of redressing some, or even all, of its concerns. It is entitled to have the circumstances investigated in the context of a winding-up petition that it is entitled to bring; and if it succeeds in establishing its complaints it is entitled under the statutory scheme to have the court consider at the end of the investigation whether the appropriate remedy is winding up or another of the remedies set out in s.95(3) of the Law…".

74. Mr Lowe referred to *Familymart China Holdings Co. Ltd v. Ting Chuan (Cayman Islands) Holdings Corporation* (CICA unreported judgment delivered on 23 April 2020) to stress the difficulty with the strike out summons in this case. Moses J.A. at paragraph 33 stated:

> "A just and equitable petition may be based on the irretrievable breakdown of a relationship of trust and confidence in circumstances where equity recognizes that such a relationship is not encompassed in the company structure defined by the relevant Companies Act and by the Articles of Association …"

75. The cases refer to relationships of trust and confidence and their background and expectations of a party which makes it unjust and inequitable for others to insist on their strict legal rights. Moses J.A. at paragraph 35 added:

> "To establish this basis for a just and equitable winding up, the petitioner has no need to reply upon a contract, it is sufficient to establish mutual understanding …"

76. Moses J.A. at paragraph 51 referred to loss of confidence on the ground of lack of probity and a breakdown in the fundamental relationship between the main shareholders being a description of the foundations of the petitioner's assertion that the company should be wound up on the just and equitable ground. Moses J.A. concluded at paragraph 63 that none of the submissions came "anywhere near justifying striking out the Petition" adding: "There was and is no basis for consideration of these appeals other than on the basis that the facts asserted are true. Whether the evidence is adequate and whether it justifies winding upon the just and equitable ground is a matter for the hearing of the Petition ..."

Reasons for the decision to dismiss the strike out summons

77. Having set out the background, and having considered the strike out summons, the relevant law, the amended winding up petition, the defence, the reply, the documentation before the court, the affidavits and the exhibits, the jurisdiction to wind up and the submissions put before the court I will shortly come to the reasons for my decision to dismiss the strike out summons. Before I do that I want to say something about the allegations of abuse and the lateness of the strike out summons.

78. The legal process is open to abuse and the courts must be on guard in this respect and endeavour to stop such potential abuse where it is likely to occur. The courts will continue to scrutinise strike out applications to ascertain if they properly and genuinely raise fundamental legal issues that need to be determined at an early stage of the proceedings or whether they are improper tactical manoeuvres designed simply to buy more time by unduly delaying the final determination of winding up petitions. The courts have powers to deter such abuse including by way of making adverse costs orders.

79. The Partnership submitted that the Petitioner was abusing the system by presenting a winding up petition when an alternative remedy was reasonably open to the Petitioner in the form of an exit from the Partnership. In my judgment the Petitioner was not abusing the process by presenting a winding up petition in the circumstances of this case.

80. The Petitioner submitted that the Partnership was abusing the system by filing a late strike out summons which had derailed the hearing dates for the winding up petition. I make no determination in that respect but I have to say that it was unfortunate that the effect, whether intended or not, of the filing of the late strike out summons which has now been determined to have no merit, was to de-rail the hearing of the winding up petition which was due to take place on 26 October 2021. The belated actions of the Partnership resulted in the winding up hearing having to be put off until January of next year. It is never desirable to vacate hearing dates.

81. Sometimes delay suits those presenting winding up petitions (for example those seeking time to finalise restructuring proposals) and sometimes delay suits those on the receiving end of winding up petitions (for example those seeking to delay or avoid judgment day). Undue delay and justice do not walk together comfortably.

82. With hindsight it is clear that the winding up petition, but for the late filing of the strike out summons, could have gone ahead as planned on 26 October 2021 and the Partnership could, at that hearing, have presented its arguments against the granting of a winding up order including arguments in respect of an alternative remedy. No unfairness would have accrued to the Partnership in proceeding with the winding up petition on the 26 October 2021. The Partnership chose instead to take steps to file, at a late stage, the strike out summons which inevitably involved the vacation of the hearing in respect of the winding up petition. The late filing of the strike out summons necessitated the vacation of 3 days of valuable court time which would have been devoted to the hearing of the winding up petition. The lateness of the summons and the vacation of the trial dates was unfortunate. Be that as it may, this court considered the strike out summons on its merits.

83. I can provide my reasons for dismissing the strike out summons fairly briefly.

84. Having considered the written and oral submissions I concluded that the strike out summons was devoid of merit.

85. This case was miles away from a plain and obvious case for a strike out.

86. It was not clear to me, even after hearing Mr Corbett's eloquent and persistent oral submissions, that there existed an adequate alternative remedy which the Petitioner had unreasonably failed to pursue.

87. It was not clear to me that clause 6.6 of the LPA provided the Petitioner with an alternative remedy or even if it did that the Petitioner was unreasonably declining to pursue it.

88. During my prolonged exchanges with Mr Corbett on clause 6.6 Mr Corbett eventually conceded, somewhat reluctantly, that both time periods provided for in clause 6.6(a) and (b) had expired and that such provisions did not provide an alternative remedy. Mr Corbett then resorted to a submission that clause 6.6 (c) was a free-standing alternative and did not expressly refer back to clause 6.6(a) or (b). At first glance I have to say that clause 6.6(c) appeared simply to provide a mechanism for exercising the provisions in clause 6.6(a) and (b) rather than providing a reasonable self-standing exit route for the Petitioner in the circumstances of this case. Frankly I did not find Mr Corbett's submissions on the clause 6.6 and the alternative remedy arguments convincing.

89. Mr Corbett also submitted in effect that the Petitioner had the remedies available to limited partners generally which must be considered in light of the ELP Act. Mr Corbett referred to section 32 of the ELP Act and the restrictions on the transfer of partnership assets. Section 32(1) provides that a partnership interest is transferable in whole or in part in accordance with the provisions of the partnership agreement and section 32. Section 32(6) provides that subject to the partnership agreement, no limited partner may (a) transfer; or (b) grant any security interest in, the whole or any part of that person's limited partnership interest except with the written consent of the general partner given prior to, or simultaneously with, the transfer or grant. Section 32(13) provides that any consent of a general partner required by the section may, subject to any express provision of the partnership agreement to the contrary, be withheld in the general partner's discretion. Mr Corbett made the point that there was no prohibition on the transfer of an interest in the Partnership with the consent of the General Partner.

90. Mr Corbett in effect submitted that it was always open to a limited partner to ask a general partner for consent to transfer his interest but, as Mr Lowe submitted, that "remedy" is not much use to a limited partner in the face of an unreasonable refusal by a general partner.

91. There were arguments either way on the reasonable exit route points which confirmed the inappropriateness of a strike out in the particular circumstances of this case. Furthermore, as the authorities (see for example *Asia Pacific* and *Tianrui*) make plain,

it is difficult to assess the reasonableness or otherwise of a petitioner's conduct prior to trial.

92. Mr Corbett in effect says that the Petitioner is bound by the terms of the agreements he entered into and his only exit is via the agreements or the ELP Act. Mr Lowe in effect says that it is not as simple as that and equitable considerations of the type referred to by Lord Wilberforce in *Ebrahimi* are in play. The fair determination of the respective arguments was not appropriate for summary disposal by way of a strike out.

93. I carefully considered all the arguments in favour of and against the proposition that the Petitioner had an alternative remedy and was unreasonably refusing to pursue it. Suffice to say it was not clear and obvious to this court that the Petitioner was unreasonably refusing to pursue an alternative remedy. It was not even clear and obvious to this court that an alternative remedy was available to the Petitioner.

94. Mr Corbett correctly accepted that for the purposes of the strike-out hearing in this case the Court basically had to consider the allegations in the petition at face value and assume their accuracy in favour of the Petitioner. I have referred to the amended petition, the allegations contained in it and some of the evidence before the court. Taking these allegations and the evidence of the Petitioner at face value (which the court normally has to do when considering a strike out summons) it was not plain and obvious that the petition for a winding up order could not succeed at trial. I was far from persuaded that the pursuit of a winding up order by way of the petition was manifestly unarguable so as to justify this court striking it out.

95. I was not persuaded that it was clearly impossible for the Petitioner to persuade a court that it would be just and equitable to make a winding up order. It may well be that the Petitioner will be able to persuade the court at trial that equity should superimpose upon the legal agreements between the parties some legitimate expectation or requirement of a right not defined therein which could enable the Petitioner to successfully obtain the relief he seeks. It may well be that the GP will be able to persuade the court that the Petitioner is bound by the agreements he signed up to and nothing more is in play. I do not pre-judge whether it is just and equitable to grant a winding up order in the particular

circumstances of this case. Suffice to say it was not plain and obvious to me that the Petitioner could not possibly succeed with his petition. The Petitioner appeared to have genuine grounds for his grievances; whether such amount to justification for the relief he seeks remains to be seen but I concluded that it would not be appropriate to stop the proceedings before the hearing of the petition on its merits. Whether a winding up order will be made at the end of the day will depend on the court's consideration of the evidence and arguments presented at the hearing of the petition.

96. I stress that I do not pre-judge the outcome of that hearing but suffice to say, applying the well-established relevant law to the circumstances of this case, I had no hesitation in concluding that it was not an appropriate case for the court to strike the petition out. The onus was plainly on Mr Corbett's client to show that it was plain and obvious that the winding up petition would fail. That onus was not discharged.

97. I did not gain the impression that the Petitioner was improperly using the winding up procedure. Whether or not the Petitioner obtains a winding up order will be an issue to be determined at the hearing of the winding up petition in January and it is not appropriate at this stage to say anything more about the respective cases of the parties.

98. In respect of costs I would be minded, subject to consideration of any submissions to the contrary, to order that the GP of the Partnership who presented and argued the failed strike out summons pay the costs of the Petitioner in respect of it, such costs to be taxed on the standard basis in default of agreement. Any concise written submissions to the contrary should be filed and served within 21 days from the delivery of this judgment. I intend to decide any outstanding issues on costs on the papers without the necessity of a further hearing.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT